

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

UNITED STATES OF AMERICA,

Government,

v.

HONORABLE GEORGE CARAM STEEH

No. 15-20652

D-3 EUGENE FISHER,
D-4 COREY BAILEY,
D-6 ROBERT BROWN, II
D-10 DEVON PATTERSON,
D-13 ARLANDIS SHY,
D-16 JAMES ROBINSON,
D-19 KEITHON PORTER,

Defendants.

/

STATUS CONFERENCE

Thursday, March 15, 2018

- - -

APPEARANCES:

For the Government:

CHRISTOPHER GRAVELINE, ESQ.
JULIE FINOCCHIARO, ESQ.
Assistant U.S. Attorney

For the Defendants:

HENRY M. SCHARG, ESQ.
On behalf of Eugene Fisher

CRAIG A. DALY, ESQ.
KEITH A. SPIELFOGEL, ESQ.
On behalf of Corey Bailey

JAMES L. FEINBERG, ESQ.
On behalf of Robert Brown

MARK H. MAGIDSON, ESQ.
JOHN T. THEIS, ESQ.
On behalf of Arlandis Shy

WILLIAM W. SWOR, ESQ.
On behalf of James Robinson

STEVEN E. SCHARG, ESQ.
On behalf of Keithon Porter

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1 Detroit, Michigan

2 Thursday, March 15, 2018

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5 **THE CLERK:** Case Number 15-20652, United
6 States of America versus Eugene Fisher, Corey Bailey,
7 Robert Brown, Devon Patterson, Arlandis Shy, James
8 Robinson and Keithon Porter.

9 **MR. GRAVELINE:** Good afternoon, your Honor.
10 Chris Graveline and Julie Finocchiaro on behalf of the
11 United States.

12 **THE COURT:** Okay. Welcome.

13 **MR. H. SCHARG:** Good afternoon, your Honor.
14 Henry Scharg appearing on behalf of Eugene Fisher.

15 **MR. DALY:** Good afternoon. Craig Daly on
16 behalf of Corey Bailey.

17 **THE COURT:** All right. Thank you.

18 **MR. JOHNSON:** Good afternoon, your Honor. If
19 it please this Court, Bertram Johnson appearing on behalf
20 of Devon Patterson.

21 **THE COURT:** Welcome.

22 **MR. THEIS:** Good afternoon, your Honor. John
23 Theis. I represent Arlandis Shy.

24 **THE COURT:** Good afternoon.

25 **MR. MAGIDSON:** Mark Magidson also

1 representing Arlandis Shy.

2 **MR. SPIELFOGEL:** Keith Spielfogel on behalf
3 of Corey Bailey, your Honor.

4 **THE COURT:** Okay. Welcome.

5 **MR. S. SCHARG:** Good afternoon, your Honor.
6 Steven Scharg on behalf of Mr. Porter.

7 **THE COURT:** Thank you.

8 **MR. FEINBERG:** James L. Feinberg on behalf of
9 Mr. Robert Brown. Learned counsel, I understand, will
10 participate by conference call.

11 **THE CLERK:** No. He'll call you later.

12 **MR. FEINBERG:** Okay.

13 **MR. SWOR:** William Swor on behalf of James
14 Robinson.

15 **THE COURT:** Welcome. All right. So we set
16 this up as a status conference. As you undoubtedly know,
17 the first group of defendants have completed the evidence
18 and the argument phases of the trial, and the jury has
19 been deliberating for a couple of days now.

20 The current trial date in this case is June 5,
21 2018. I don't necessarily want to jump ahead to that if
22 there are other preliminary matters that have to be
23 discussed. Mr. Graveline do you have items on your
24 agenda?

25 **MR. GRAVELINE:** I went through the docket

1 last night for all pending motions I think in this case,
2 and right now -- and I bring this up so if I'm wrong,
3 counsel, please let me know -- but I believe we have filed
4 a response to everything except for the suppression that
5 Mr. Scharg has filed on behalf of Mr. Fisher, and then
6 there's one motion to suppress that Mr. Daly filed, and so
7 I think those are the only two outstanding motions that we
8 need to respond. I believe they are both due a week from
9 today, March 22nd.

10 So in terms of motion practice, I think the Court
11 has our responses to every other motion that's been filed
12 by this particular trial group. Am I incorrect at all by
13 any of the counsel? Is that right? I think that's right.
14 So I think in terms of briefing we're there.

15 In terms of the June 5th trial date, so this is
16 where we stand. We have four defendants in this trial
17 group who are still face death eligible charges. I have
18 not been able to forward all the materials up to
19 Washington D.C. given our ongoing trial, but I hope to
20 have all of those materials up to Washington D.C. if not
21 by tomorrow, then by Monday.

22 I've talked to the capital case section about the
23 timing of this, and while it's a very tight turnaround,
24 they are also saying it's the same panel considering every
25 defendant in this case who has already read for defendant

1 Arnold's submission as well. So we're not submitting to
2 people who are not familiar with the case.

3 And so in terms of, can I absolutely agree right
4 now, I think it's a tight turnaround, and so -- but we're
5 trying very hard to meet that deadline.

6 And so right now we stand approximately 75 days
7 out from trial. I think probably to be completely safe is
8 to maybe set the trial out 90 days from right now. So
9 maybe mid-June, but at the same time if we keep it at
10 June 5th, I don't think that's an impossible task. I'm
11 just saying that it's going to be pretty tight based upon
12 what Washington D.C. has communicated to me.

13 So that's where we stand in terms of timing of
14 that. All of those should be up to Washington D.C. by
15 Monday for their consideration, and those four defendants
16 are Corey Berry, Arlandis Shy, Robert Brown and Keithon
17 Porter.

18 **THE COURT:** Do you know the status of
19 mitigation packages?

20 **MR. GRAVELINE:** The only one that I'm still
21 missing is Mr. Robert Brown's, and so I think going
22 through this last trial has also helped the government a
23 bit as well.

24 So, for example, one of the things that Mr.
25 Feinberg has been asking for is when Mr. Elroy Jones

1 was -- he made a motion to have his conviction overturned
2 in the murder of Cleo McDougal. The government was
3 unaware, but Mr. Feinberg brought this to our attention
4 that there was a several day motion practice and multiple
5 witnesses were called. So we just received those
6 transcripts of that motion practice about a week and a
7 half ago. So that was helpful in informing -- you know,
8 preparing Mr. Brown's submissions, and I think that's why
9 Mr. Brown's mitigation submission is trailing a little
10 bit. They were waiting for those records.

11 Another thing that I personally was waiting for,
12 there was a cell phone seized from Corey Bailey upon his
13 arrest in July of 2014. The FBI had not previously been
14 able to get into that phone, and if the Court remembers,
15 we had a similar issue with one of which Michael Rogers'
16 phones, and we were able to get into it in the first week
17 of February based upon some new technology that allowed us
18 to actually dump the phone.

19 And so the report was made for Mr. Rogers' phone.
20 I still don't have the complete report from Mr. Bailey's
21 phone. I was hoping to get that during trial, but Agent
22 Ruiz's is being tied up in court on most of those days.
23 That report has not been compiled. He's been working on
24 that over the last day or two, and I hope to have that to
25 Mr. Bailey. I'm not saying there's anything relevant in

1 that. I just wanted to make sure that the phone that was
2 seized from Mr. Bailey approximately eight days after the
3 Djuan Page homicide, didn't have something in there that
4 would inform us one way or the other in terms of that
5 death penalty submission. So that's where we stand in
6 terms of the timing and capital case process.

7 **THE COURT:** All right. Who would like to
8 start? Mr. Swor you're at the end of the line. Any input
9 as to whether the date should be back couple weeks or try
10 to maintain?

11 **MR. SWOR:** I have to be at the Outer Banks of
12 North Carolina the last week in July. We keep pushing
13 this trial back. It is a large family gathering. It may
14 involve a wedding. Not mine. So I have to be there I
15 guess.

16 **THE COURT:** You have to be there a day or
17 two?

18 **MR. SWOR:** No, the week. It's a week of
19 family events.

20 **THE COURT:** I see. Okay. So prefer to keep
21 the time and date?

22 **MR. SWOR:** Yes.

23 **THE COURT:** And Mr. Robinson is not one of
24 death eligible defendants?

25 **MR. SWOR:** That's true.

5 My learned counsel Martin, who was not able to be
6 here today, informed me that his mitigation submission, at
7 least as of last week, the end of last week, was not done
8 because we had just gotten the evidentiary hearing
9 transcripts that Mr. Graveline told the Court about.

10 I don't know when he is going to finish the
11 submission. I thought it was going to be this week, but I
12 can't tell the Court if it is going to be this week or the
13 beginning of next week.

21 THE COURT: All right. Mr. Scharg?

24 My client strongly suggests that his case not be
25 adjourned again. We have prepared for trial. We are

1 ready to go to trial. He does not want anymore
2 adjournments.

3 My issue also would be, I have another trial
4 starting on June 12th. That's another gang related case,
5 and if this case gets postponed after the 12th, then that
6 case might run into the next case.

7 **THE COURT:** So that -- do you know that
8 defendant?

9 **MR. GRAVELINE:** Latin Counts.

10 **MR. S. SCHARG:** Latin Counts.

11 **THE COURT:** Is that one that you're handling
12 also?

13 **MR. GRAVELINE:** No, just supervise.

14 **THE COURT:** Okay. Okay.

15 **MR. SPIELFOGEL:** Mr. Daly wants to address
16 the Court on behalf of Mr. Bailey.

17 **THE COURT:** Okay.

18 **MR. DALY:** Mr. Bailey is adamant that we
19 begin on the trial date that's set. I am assuming that
20 learned counsel will also be present. If not, that would
21 raise a separate issue.

22 **THE COURT:** Learned counsel be present for
23 the trial?

24 **MR. DALY:** Yes.

25 **THE COURT:** Yes.

1 MR. DALY: Okay. That's all.

4 MR. DALY: Well, that's important.

13 MR. DALY: Okay.

25 **MR. DALY:** Yes, we have started that process.

1 THE COURT: All right.

7 MR. H. SCHARG: It was my case.

14 THE COURT: I remember now. Thank you.

23 || MR. DALY: Yes.

24 THE COURT: Right. All right.

25 **MR. MAGIDSON:** Mark Magidson on behalf of Mr. .

1 Shy. I think the Court already knows Mr. Shy's position
2 on these further delays having filed previous --

3 **THE COURT:** I don't know. They're all so
4 shy. Go ahead.

5 **MR. MAGIDSON:** So he objects for all the
6 reasons that, as we know been, he's been locked up now for
7 two years.

8 And so in addition, I have a paid vacation in
9 August, mid-August. I'm anticipating that would -- even
10 if it is a two month trial, I thought I was safe by
11 booking a place in August.

12 **THE COURT:** Okay.

13 **MR. MAGIDSON:** It's a family vacation, which
14 is about 10 days.

15 **THE COURT:** You will be ready to go?

16 **MR. MAGIDSON:** Yes.

17 **THE COURT:** All right.

18 **MR. MAGIDSON:** I think John wants to speak to
19 the other issue.

20 **MR. THEIS:** I just want to, Judge, respond.
21 You asked about the standard procedure for keeping a
22 second lawyer. It has been done both ways. We have
23 discussed, if the Court would like, we can provide some
24 history of that. This one I think is fairly clear of a
25 second lawyer because of the volume of the discovery in

1 this case, number of witnesses, the length of the trial.
2 Very frankly, the length of time it has taken to get a
3 decision with regards to the death penalty eligibility is
4 pushing it back, so as we get closer to trial, the work of
5 two people has to be consolidated into one. We are
6 preparing for trial on this case, and I just think it
7 would be a tremendous hardship. It would put Mr. Shy at a
8 tremendous disadvantage in the trial not to have a second
9 lawyer on the case.

10 **THE COURT:** Thank you. Mr. Swor?

11 **MR. SWOR:** During the O'Reilly case, which
12 was Harold Gurewitz's case in this district, which is the
13 last one that was tried, Mr. Gurewitz had at least second
14 learned counsel present through the entire trial.

15 **THE COURT:** I have a question of you, Mr.
16 Swor. Did you say your conflict was in the middle of
17 July?

18 **MR. SWOR:** The last week of July.

19 **THE COURT:** Is that cutting it pretty close
20 even if we start on June 5th?

21 **MR. GRAVELINE:** This past trial I think we
22 took five weeks, and we're going into the sixth week right
23 now. So I think that went fairly fast, and it was four
24 defendants. So a seven week trial, six or seven weeks, I
25 mean, it's going to be close, but I think --

1 THE COURT: It's possible?

2 MR. GRAVELINE: It's possible.

5 MR. SWOR: It's paid for.

25 THE COURT: Definitely, and it allows

1 everybody to keep up their schedule.

2 **MR. FEINBERG:** I would join in on some of the
3 other attorneys' request having learned counsel
4 participate in the entire trial with Mr. Brown and myself.

5 **THE COURT:** Okay. Mr. Johnson?

6 **MR. JOHNSON:** With respect to Mr. Patterson,
7 we are happy to move forward for all of the reasons
8 stated. However, I do understand the issues that the
9 death eligible counsel have stated, but we are ready to
10 move forward on behalf of Devon Patterson.

11 **THE COURT:** All right. So it maybe cutting
12 it close, but it sounds like we ought to try to maintain
13 the turnaround.

14 **MR. GRAVELINE:** Very good, your Honor. We'll
15 get it done.

16 **THE COURT:** Okay. So we'll keep the date,
17 and -- and I don't know what we'll do about the potential
18 break around the Fourth of July, because I have a feeling
19 that -- again, if jury selection was at all indicative for
20 the first group of what might happen in the second, I
21 think that opportunity for the break around a school
22 holiday was pretty helpful in getting jurors to agree to
23 participate, and so I thought that natural break period
24 would be around the July 4th holiday.

25 The difficulty -- one of the difficulties that

1 Marcia just pointed out for me is that the jury
2 questionnaires are going out in two weeks, and so we've
3 got to have a pretty firm idea -- set pretty firm dates if
4 we're going to properly forewarn the jurors about the
5 length of the trial and the schedule that we're going to
6 follow.

7 So I don't know about going until 2:00 frankly. I
8 mean, to ask people to go that long without sustenance is
9 I think pushing it. Perhaps maybe we can split the
10 difference and go to 1:30.

11 **MR. GRAVELINE:** That would be fine, your
12 Honor.

13 **THE COURT:** The period of time to complete
14 this first trial was shortened considerably by the
15 experienced lawyers on the defense side frankly. We have
16 a similar group. So I would think we would be approaching
17 it -- I couldn't imagine a much more efficient trial
18 taking place. The defense lawyers asked no questions of a
19 large number of -- I'm sure if you're getting transcripts
20 already, you're seeing that the -- the lawyers identified
21 their issues, their theory of the case, and stuck close to
22 both the theory of the case and the specific factual
23 disputes that exist in the case. So there was no
24 showmanship, and I'm sure we'll have a similar experience
25 here. But I don't think it can get anymore efficiently

1 done than this first group.

2 **MR. GRAVELINE:** I agree, your Honor. We went
3 through 101 witnesses in five weeks.

4 **THE COURT:** That's pretty amazing. Nobody --
5 I think nobody would believe at first glance that that
6 occurred going half days.

7 **MR. FEINBERG:** Your Honor, is it possible for
8 the attorneys in this group to receive the jury
9 questionnaires to see whether or not, based on our input,
10 if any additional questions maybe included in the
11 questionnaire?

12 **THE CLERK:** The attorneys have to agree on
13 the questions that go into the questionnaires. The jurors
14 are being summoned in the next two weeks to appear to fill
15 out the questionnaires.

16 **MR. FEINBERG:** Are we talking about the jury
17 questionnaires specific to this case?

18 **THE COURT:** Right.

19 **THE CLERK:** The first trial?

20 **MR. FEINBERG:** Yes.

21 **THE COURT:** I'm sorry. What good would that
22 do you? I don't understand.

23 **MR. FEINBERG:** I don't want the jury
24 questionnaires and their answers from the first trial.

25 **THE COURT:** Just the questions? I see.

3 **THE COURT:** Has that been finalized?

9 MR. FEINBERG: That's correct.

14 THE CLERK: I can find it.

22 Okay. We need to couple of suppression hearings as
23 I understand it, and everything else -- are there any
24 various motions that are now pled?

25 So we have Mr. Bailey's motion to exclude rap

1 videos, and that's joined by Mr. Shy, Mr. Brown and Mr.
2 Patterson, and we have the motion and the answer, and I
3 don't know if Mr. Bailey or any of the joining
4 defendants --

5 **MR. FEINBERG:** Judge, I'm having difficulty
6 hearing you.

7 **THE COURT:** Okay. So as it relates -- as it
8 relates to that motion, first of all, we have a motion and
9 response. Do we have a reply?

10 **MR. GRAVELINE:** I don't believe so, your
11 Honor.

12 **THE COURT:** I might report for the benefit of
13 Mr. Daly and Mr. Spielfogel, that I went through this on
14 the first round, and I set out a procedure that would be
15 used for determining the admissibility of specific rap
16 lyrics and videos, and so I would anticipate a similar
17 procedure in this case, and the question is whether you
18 wanted an opportunity for a reply following the response
19 by the government, or whether you would end up in
20 agreement with the procedure that I employed in the first
21 trial group.

22 **MR. SPIELFOGEL:** Your Honor, I believe we
23 asked to file a reply.

24 **THE COURT:** How soon can you get that in?

25 **MR. SPIELFOGEL:** One week.

1 THE COURT: One week from today.

2 MR. SPIELFOGEL: Thank you, Judge.

12 MR. GRAVELINE: Yes.

17 THE COURT: Okay. A week after what?

22 We also have a motion by Mr. Bailey to suppress
23 cell phone evidence. We don't have a response to that
24 motion by the government as of yet. Did you intend to
25 respond?

1 MR. GRAVELINE: Is this a Daubert motion?

21 THE COURT: Okay.

25 MR. GRAVELINE: I think we've already

1 produced that.

2 **MR. FEINBERG:** The entire homicide file?

3 **MR. GRAVELINE:** I believe so. With our
4 Jencks disclosures as well, that would complete that
5 homicide file.

6 **MR. FEINBERG:** I will check.

7 **MR. DALY:** I think there's -- it's not clear
8 from what the government is saying in terms of what
9 they've actually produced on the homicide files.

10 This particular motion is to have the actual
11 jackets of the Detroit Police Department Homicide Section
12 delivered to a place where the defense lawyers can
13 actually look at it; that is, not to have the government
14 go through it first and decide what they want to give us.
15 That's the specific motion. They filed a response. We
16 filed a reply, and we are waiting for a ruling on that
17 Judge. So I think it is different than what the
18 government is telling us right now.

19 **MR. GRAVELINE:** I did not understand it. I
20 thought it was disclosure of that, and disclosure means we
21 review it and produce what's relevant.

22 So for example, so within the Detroit homicide
23 file, there's papers in there from photocopies of Wayne
24 County Prosecutor's notes or emails between two Wayne
25 County Prosecutors about charging decisions. I don't

1 think that becomes, you know, disclosable in any way,
2 shape or form.

3 So I would object to yeah, I'm just going to
4 deliver the homicide file and let people go through it. I
5 believe it's our responsibility to go through and produce
6 what's relevant, not work product, not, for example, the
7 Wayne County Prosecutor's witness list from that, what
8 they turned over at the time. Those things are not
9 disclosable. The disclosables are things like the
10 investigation, statements taken, that type of material.

11 **MR. DALY:** So what I would propose, and we've
12 done this in the past, is that the defense lawyers go
13 through it. Whatever we want, we tag. If the government
14 doesn't want to give it to us, we can then seal that, give
15 it to you in camera, and let you decide instead of letting
16 the government decide what's relevant for us to see,
17 because in the past when we've done this, we've seen
18 progress notes about other suspects that the government
19 never turned over to us. We have found Brady statements
20 as well that the government did not turnover.

21 So the process that I'm proposing will give the
22 government a chance to object once we see it. It's a
23 whole different process.

24 **MR. FEINBERG:** Judge, as it relates to Mr.
25 Brown, our situation is a little bit different, because

1 another defendant had been tried twice and convicted.
2 Ultimately, that person's case was granted a new trial,
3 and the case was dismissed. So I think it is very
4 important for us to know exactly what kind of notes that
5 were going on relating to the trial in that case,
6 potential suspects, witnesses that may not have testified
7 or been given to us. So we need to be able to go through
8 the entire homicide file ourselves, along with exactly
9 what Mr. Daly said, just to find out whether or not
10 there's something in there that definitely helps our case.

11 **THE COURT:** The difficulty that I have Mr.
12 Daly with your suggestion is that to the extent that the
13 government is asserting privilege or work product, I don't
14 know how Detroit homicide file could necessarily --

15 **MR. GRAVELINE:** I'm talking about, for
16 example, an email in there between two prosecutors
17 yesterday. I mean, that's work product. That's not -- I
18 mean, I don't know why it's in DPD homicide file, but it's
19 in there.

20 **THE COURT:** Before you get to sit down with
21 the file, it would seem to me that the government should
22 go through the file and identify any items they believe
23 are privileged or not discoverable for some whatever
24 reason, and they could furnish you that -- the description
25 of what they have removed, but they should probably have

1 the opportunity to remove from the file anything that
2 would otherwise would be undiscernable, and then give you
3 the opportunity to do that, but I don't know -- is there,
4 again, an established way that the Detroit Police have for
5 producing materials like this for examination?

6 **MR. GRAVELINE:** Not that I'm aware of. I
7 have to ask DPD homicide. I don't know what they do in
8 state court practice for homicide, but I can find out.

9 **MR. DALY:** It's simply a red row jacket where
10 all the documents are contained.

11 **THE COURT:** Red --

12 **MR. DALY:** Red row.

13 **MR. GRAVELINE:** One of these.

14 **MR. DALY:** It's much bigger, and they just
15 literally bring the whole file and put it on the desk, and
16 allows the defense to make that decision about what's
17 relevant and what maybe important, rather than the
18 government doing it initially. But if the government is
19 going to go through and take certain things out, I think
20 they have to identify that, and create a separate file at
21 least, and then either you will look at it in camera or
22 we're going to look at it.

23 **THE COURT:** Right.

24 **MR. DALY:** One of the two.

25 **THE COURT:** Right. That's what I was trying

1 to say, but you probably said it better. Okay. All
2 right. So Mr. Graveline should be able to find out what
3 the procedure is over in Detroit.

4 **MR. GRAVELINE:** Yes, your Honor. I'll have
5 answers for all of it tomorrow.

6 **THE COURT:** All right. So again, returning
7 to the motions, Mr. Bailey's fourth motion is to strike
8 allegations and preclude evidence regarding homicide and
9 the shooting for which the defendant was tried and
10 acquitted, and that I think is what we were just talking
11 about, and that's the file that you're talking about
12 having access to, is that right?

13 **MR. DALY:** That's one of the files, but the
14 argument is essentially a double jeopardy argument, Judge.

15 **THE COURT:** Two different sovereigns?

16 **MR. DALY:** Yes.

17 **THE COURT:** Okay. So that's been answered?

18 **MR. GRAVELINE:** Yes, your Honor.

19 **THE COURT:** And did you intend to reply, Mr.
20 Daly?

21 **MR. DALY:** No.

22 **THE COURT:** Okay. So I'll assess that on the
23 papers unless I conclude that I really need oral argument,
24 and then I'll have you come in.

25 The fifth argument is Corey Bailey's motion for

1 Bill of Particulars, and I don't know if that was joined
2 in -- it was by Mr. Shy. So that's been answered?

3 **MR. GRAVELINE:** Yes, your Honor.

4 **THE COURT:** And is there going to be a reply?

5 **MR. DALY:** No, sir. There will not be.

6 **THE COURT:** All right. Thank you. I'll
7 follow the same process for that one.

8 So we have the government had responded that
9 discovery would be provided January 4th, and it is your
10 position that it's been fully complied with?

11 **MR. GRAVELINE:** For which? I'm sorry.

12 **THE COURT:** There is for this -- you
13 previously argued that the discovery will make it clear to
14 the defendants what they are charged with.

15 **MR. GRAVELINE:** That's correct. We produced
16 Jencks, your Honor, back on December 26th. There's some
17 Jencks that's particularly relevant to this trial of
18 witnesses we didn't call at the last trial. We will
19 produce that to the defense here as well, and yes, we
20 stand by that. So when we put Jencks out for the first
21 trial, we gave it to all defense counsel.

22 **THE COURT:** Okay.

23 **MR. GRAVELINE:** So now there are witnesses
24 that we will be calling in the second trial that are
25 different than the first trial. So we need to go back and

1 make sure we produced Jencks for those individuals as
2 well, and we will.

3 **THE COURT:** All right. There was an issue in
4 the first trial that dealt with the theory of the case,
5 and the government's assertion of -- I'm trying to
6 remember now -- the government's corporation of the --
7 well, it dealt with our jury instructions.

8 **MR. GRAVELINE:** Pinkerton, your Honor.

9 **THE COURT:** Right.

10 **MR. GRAVELINE:** We will be proceeding on
11 Pinkerton on Count 32.

12 **THE COURT:** And were you going to provide
13 some formal notice?

14 **MR. GRAVELINE:** I will email everyone to that
15 effect.

16 **THE COURT:** And defense counsel may already
17 be familiar with the issue given the transcripts of that
18 trial.

19 **MR. DALY:** With regards to the Jencks
20 material that the second group has not received, is it the
21 government's intention to give it to us 30 days before
22 trial at least?

23 **MR. GRAVELINE:** At least, but I'm going to do
24 it before that. It will be at least 30 days, but I'm
25 hoping to get it done in the next three weeks or so. I

1 don't -- we've got quite a bit of things that are starting
2 to pile up on in getting done in the next week or two, but
3 it's my intention to have it probably by 45 days out.

4 **THE COURT:** Okay. Thank you. All right.

5 So Mr. Porter has a motion for additional
6 discovery, and given what the government has turned over,
7 is discovery still an issue?

8 **MR. S. SCHARG:** Judge, I realize he filed a
9 response to that motion. So I'll look at it.

10 **THE COURT:** Okay. So you don't know whether
11 or not you wish to file a reply?

12 **MR. S. SCHARG:** I will file a motion to
13 dismiss. My client indicates that he believes the
14 government took too long to respond for our motion for
15 discovery, and that their response should be vacated.

16 **THE COURT:** All right. Thank you.

17 So I'll expect if you're going to file a reply,
18 that you do it within a week or if you're filing a
19 withdraw based on the representations of discovery then
20 you can indicate that also.

21 **MR. S. SCHARG:** Thank you, Judge.

22 **THE COURT:** Mr. Patterson has a motion to
23 remove Mr. Johnson as his counsel. Obviously, if that
24 were to happen, nobody would be going to trial on
25 June 5th, but Mr. Patterson, have you and Mr. Johnson

1 worked that out?

2 **DEFENDANT PATTERSON:** Absolutely, your Honor.
3 With all due respect, that motion was filed months ago,
4 I'm definitely satisfied with my attorney, and we're
5 moving forward.

6 **THE COURT:** All right, sir. Thank you. We
7 will allow that motion to be withdrawn.

8 Mr. Bailey has a motion for a Daubert hearing, and
9 to preclude the testimony of the proposed experts cellular
10 analysis. The Court has ruled on the subject matter of
11 that motion in the first, since we had joinders to the
12 motion in the first group, and you've answered?

13 **MR. GRAVELINE:** Yes.

14 **THE COURT:** Has there been a reply?

15 **MR. DALY:** No, we didn't file a reply, but
16 we've asked for a hearing, Judge.

17 **THE COURT:** A hearing, meaning oral argument
18 on the issue?

19 **MR. DALY:** No, evidentiary.

20 **THE COURT:** All right. So as an evidentiary
21 hearing, we should be allocating --

22 **MR. GRAVELINE:** Just to inform the Court,
23 part of our response was there's no need for an
24 evidentiary hearing. We believe the Court can rule
25 without calling an actual Daubert hearing based upon the

1 nature of the evidence in this case.

2 So perhaps if the Court takes a look before
3 setting an evidentiary -- and if the Court believes an
4 evidentiary hearing is necessary, then obviously that's
5 what we'll do, but as part of our response, it's not
6 necessary.

7 **THE COURT:** That makes sense. Not the
8 outcome necessarily, but the idea that I look at it,
9 screen it first to decide if we need a hearing.

10 Mr. Fisher has a motion to suppress physical
11 evidence, and that's been answered?

12 **MR. GRAVELINE:** It has not, and we intend to
13 have an answer to the Court by next Thursday, which would
14 be three weeks from March 1st.

15 **THE COURT:** Okay. Mr. Scharg?

16 **MR. H. SCHARG:** I'll go out on a limb, and
17 say I don't know how the Court could resolve this without
18 an evidentiary hearing based upon the allegations made.

19 **THE COURT:** All right. So let's make --
20 let's set that one for a hearing.

21 **MR. GRAVELINE:** Okay.

22 **THE COURT:** Do you need anything more than a
23 couple of hours?

24 **MR. H. SCHARG:** No, your Honor.

25 **THE COURT:** Okay.

1 MR. GRAVELINE: That's sounds appropriate.

2 THE COURT: Okay.

10 MR. GRAVELINE: No, your Honor.

11 THE COURT: Will there be a reply?

12 MR. H. SCHARG: I haven't gotten a response.

13 THE COURT: What week?

18 MR. GRAVELINE: No.

19 THE COURT: Okay.

23 THE COURT: Next Thursday, week from today?

24 THE CLERK: How about April 11th at 2:30.

25 MR. GRAVELINE: That works for the

1 government.

2 **THE COURT:** A Wednesday.

3 **MR. H. SCHARG:** I would ask the Court to do
4 it in the morning in case --

5 **THE CLERK:** We have a bench trial in the
6 morning.

7 **MR. H. SCHARG:** We can start I don't know --

8 **THE CLERK:** Maybe 2:00?

9 **THE COURT:** Set it for two. I would think --
10 you have two witnesses you expect?

11 **MR. H. SCHARG:** I think about 4-5. They are
12 short witnesses because it's a very narrow issue.

13 **THE COURT:** Okay.

14 **MR. H. SCHARG:** We'll try.

15 **THE COURT:** Okay. So we have Mr. Keithon
16 Porter's motion to dismiss the indictment. That's been
17 answered Mr. Graveline?

18 **MR. GRAVELINE:** Yes, your Honor.

19 **THE COURT:** And is there going to be a reply?

20 **MR. S. SCHARG:** Judge, I'll make that
21 decision. I think I can respond by I think the 28th.

22 **THE COURT:** Yes, so within a week if you're
23 going to?

24 **MR. S. SCHARG:** Yes, your Honor. I will let
25 your clerk.

1 My client wants me to address the issue about the
2 Jencks materials. It was his misunderstanding that all of
3 the Jencks material was submitted prior to the last
4 Court's ruling deadline when Jencks material had to be
5 submitted to all counsel. Now it is known to us that
6 there are additional witnesses, Jencks materials, that
7 have not been given to us for the second group. We want
8 to make sure -- we want the Court to address that issue
9 because we thought they were suppose to give all Jencks
10 material in its entirety, and why are we getting all of
11 this new Jencks material now when we're only so many days
12 from trial.

13 **THE COURT:** Okay. All right. Mr. Graveline?

14 **MR. GRAVELINE:** Your Honor, I think that was
15 just a misunderstanding by them because -- so, in fact, I
16 think the government's obligation was only give it to
17 Trial Group 1 to be quite frank. They were the ones that
18 were going to trial, and in terms of -- for all the
19 reasons as laid out in the Jencks Act and also witness
20 security, we gave Jencks 30 days out for that reason, and
21 so the fact that we gave it to everybody, for the people
22 that we were calling in the first trial group, I think was
23 something we didn't have to do, quite frankly, for Trial
24 Group 2.

25 So we've given them an 80 percent solution already

1 in this matter. I think we are complying with the Jencks
2 Act. We're keeping with what we've told counsel before,
3 and we will be given whatever Jencks material is
4 additional to the people who are different than who we
5 called in Trial Group 1.

6 **THE COURT:** All right. Thank you.

7 We have Mr. Bailey's motion to suppress. Have we
8 already addressed that?

9 **MR. GRAVELINE:** I believe that's the one that
10 we will respond to next week as well. So there's three
11 suppression I believe, two for Mr. Bailey, one that was
12 filed by Mr. Minock back in September. I think that's why
13 I missed it. There's one by Mr. Daly which was filed I
14 believe in December, and then the one by Mr. Scharg.
15 We'll have responses on all of those by next Thursday.

16 **THE COURT:** All right. Thank you.

17 **MR. DALY:** I should say that there are a
18 number of factual issues that will need to be resolved by
19 an evidentiary hearing. I don't believe that you could
20 rule on the pleadings.

21 **THE COURT:** On the suppression?

22 **MR. DALY:** Yes. So I think it might be
23 well -- I would kind of anticipate that as well. So do
24 you have a reason to think otherwise, Mr. Graveline?

25 **MR. GRAVELINE:** No, but I think the motion

1 that Mr. Daly is talking about is going to require some
2 time. So that one motion to suppress, there's six
3 different factual scenarios and arrests that have
4 different theories of suppression. So it's kind of really
5 almost like six motions to suppress just to let the Court
6 know. I think we're going to probably need between six to
7 10 witnesses for that, and so when planning an evidentiary
8 hearing, we will need two days or probably a full day.

9 **THE COURT:** Okay. Having fun yet? So we'll
10 plan on a day or two. Do you want to set a date now? You
11 want for both suppression motions?

12 **MR. GRAVELINE:** That's correct.

13 **THE COURT:** And then you anticipate a reply?

14 **MR. DALY:** On the motion to suppress Fourth
15 Amendment issues, yes.

16 **THE COURT:** All right. That will be within a
17 week of the -- which puts it out -- you're response date
18 again is a week from Thursday?

19 **MR. GRAVELINE:** Yes, your Honor, March 22nd.

20 **THE COURT:** Week from this Thursday?

21 **MR. GRAVELINE:** A week from today.

22 **THE COURT:** Today?

23 **MR. GRAVELINE:** Yes.

24 **THE CLERK:** Wednesday, April 25th.

25 **MR. DALY:** What time?

1 THE CLERK: 9:00.

2 || MR. DALY: All day?

4 MR. DALY: That's fine.

15 MR. GRAVELINE: That's correct, your Honor.

7 MR. SPIELFOGEL: We would object to that.

8 MR. FEINBERG: And we would object to that.

9 MR. S. SCHARG: We do.

10 MR. THEIS: As we.

16 MR. SPIELFOGEL: There's several cases, your
17 Honor, going each way and --

1 that back a week to maybe May 8th. I think that's more
2 realistic.

3 **DEFENDANT PATTERSON:** No pleas.

4 **THE COURT:** This isn't going to affect the
5 trial date. This is a date that we hold to address each
6 of you to know if you've satisfied everyone, that you're
7 fully informed and acting of your own volition, nobody is
8 forcing you to do otherwise. So it's for our planning
9 purpose. So it's important to know ahead of trial who's
10 going forward or not, and if you all want to go forward,
11 and you're all still here, then we will.

12 **DEFENDANT BROWN:** We ready to go to trial
13 now.

14 **THE COURT:** Right.

15 **DEFENDANT BROWN:** It keeps getting pushed
16 back.

17 **THE COURT:** We're not pushing the date back
18 as of today at least we're not.

19 **DEFENDANT BROWN:** Thank you. I appreciate
20 that.

21 **THE CLERK:** May 10th?

22 **MR. GRAVELINE:** That will be fine.

23 **THE COURT:** That will be the cutoff instead
24 of April 30th.

25 **MR. FEINBERG:** May 10th is a Thursday?

1 THE CLERK: May 10th is a Thursday.

2 THE COURT: That's all on my agenda.

3 Mr. Scharg?

9 THE COURT: Well, it wasn't all standard.

10 MR. H. SCHARG: I mean, standard in terms --

1 Just throwing this out for everyone, is it possible that
2 the defense attorneys get together prior to trial and with
3 the government, and see if we can weed out certain jurors
4 that we can agree would not be acceptable to both parties
5 to try to expedite the process?

6 **THE COURT:** Yes, that was done with the first
7 group, and we would expect you to do it with this group as
8 well, and not only that, I mean, one of the reasons the
9 first trial was done so efficiently is because defense
10 counsel got together and coordinated their planned
11 examinations, and so everybody knew what their roles were
12 going to be, and everybody got a chance to participate,
13 but not without unnecessary duplication because there is a
14 lot of potential for duplication since the theories will
15 often play out in a similar way and the -- they really
16 avoided a lot of repetitiveness, which is one of the major
17 complaints that we hear from jurors, do you think we're
18 stupid? We have been told that 10 times in 15 different
19 ways. So we would expect a deal of communication on the
20 defense side to help to coordinate as well.

21 Anything on the government's part?

22 **MR. GRAVELINE:** No, your Honor.

23 **THE COURT:** Yes, Mr. Feinberg?

24 **MR. FEINBERG:** Yes, your Honor. During the
25 first trial, Jonathan Murphy was testifying on behalf of

1 the government, and apparently -- and I've seen the
2 transcript where he was caught committing perjury. The
3 question that I need to know -- and that was testimony
4 that was involving Mr. Brown -- what I need to know is
5 what the government is going to pursue concerning Mr.
6 Murphy? What we can bring out as a result of Mr. Murphy's
7 perjury, and I don't know whether or not the Court wants
8 us to file a formal motion as a result of that, or whether
9 or not that's something that we can discuss and reach some
10 kind of an amicable decision.

11 **MR. GRAVELINE:** We are always up to
12 discussion, your Honor.

13 **THE COURT:** Again, I encourage you to talk to
14 one another. We are past the motion cutoff date.

15 **MR. FEINBERG:** The problem is that Mr. Murphy
16 just testified.

17 **THE COURT:** Right.

18 **MR. FEINBERG:** And I was not made aware of
19 his perjury before the motion cutoff. So this maybe
20 something that needs to be done as a motion in limine.

21 **THE COURT:** Okay. It might be a proper
22 subject for a motion in limine.

23 **MR. S. SCHARG:** Judge, briefly. Mr. Porter
24 advised me this morning that he needs immediate medical
25 attention. He's being housed at the Midland County Jail.

1 He's been spitting up blood. He's been asking to go to
2 hospital. They are not complying with any of his
3 requests. He does suffer from bullet wounds that he has
4 before he was arrested in this case, but he is in
5 desperate need of medical attention, and they are not
6 providing medical attention, and he would like to be moved
7 out of Midland.

8 **THE COURT:** Have they not responded at all?

9 **MR. S. SCHARG:** From what I understand, the
10 only way he can get medical attention is to put him in the
11 hole for a couple days, and then maybe he will get to see
12 a doctor at that point, but he needs approval from the
13 marshals.

14 **THE COURT:** He needs approval to be moved for
15 medical attention?

16 **MR. S. SCHARG:** Yes, your Honor. He's asking
17 if he could go to Milan to get medical attention there.

18 **THE COURT:** All right. So have you been made
19 aware of this?

20 **THE MARSHAL:** No, this is first we heard of
21 it. We can complete another alert notice, contact the
22 facility, and find out the circumstances and advise the
23 Court.

24 **THE COURT:** Okay. All right. Is this
25 related -- I know that earlier in the case the defendant

1 asked to have the detention order revoked to get medical
2 attention. We offered to direct medical attention, and he
3 indicated that he really didn't want to have it at that
4 point. So this is the same condition?

5 **MR. S. SCHARG:** No, your Honor. He advised
6 me -- that is true, your Honor. The Court was willing to
7 comply with his request at the detention hearing. However
8 now, he is, in fact, spitting up blood.

9 **DEFENDANT PORTER:** There are no doctors. I'm
10 in pain. I didn't see a doctor until Monday. Feeling
11 chest pains. I was shot in the chest.

12 **THE COURT:** Mr. Scharg, have you talked to
13 Midland?

14 **MR. S. SCHARG:** I have not since the last
15 time, but about the blood situation, I was just told about
16 it.

17 **THE COURT:** Well, I think before we call on
18 the marshal to do anything, you should talk to the
19 facility, and understand what they're saying about it, and
20 then communicate with the marshal.

21 **MR. S. SCHARG:** I will. Thank you.

22 **THE COURT:** All right. Anything else on
23 defense side?

24 **MR. MAGIDSON:** Is there a time for the plea
25 cutoff?

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4

5 (Proceedings concluded.)

6

C E R T I F I C A T I O N

8 I, Ronald A. DiBartolomeo, official court
9 reporter for the United States District Court, Eastern
10 District of Michigan, Southern Division, appointed
11 pursuant to the provisions of Title 28, United States
12 Code, Section 753, do hereby certify that the foregoing is
13 a correct transcript of the proceedings in the
14 above-entitled cause on the date hereinbefore set forth.

15 I do further certify that the foregoing
16 transcript has been prepared by me or under my direction.

17

18

19

20 Ronald A. DiBartolomeo, C

May 9, 2019

20 Ronald A. DiBartolomeo, CSR
Official Court Reporter

Date

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